UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GLASS FABRICATORS, INC. AND
GLASS AND METAL SOLUTIONS, INC.
ALTER EGOS
Respondents,

And **CASE NO: 08-CA-174567**

INTERNATIONAL UNION OF PAINTERS & ALLIED TRADES DISTRICT COUNCIL 6

Charging Party

PAINTERS DISTRICT COUNCIL NO. 6'S POST HEARING BRIEF

Charging Party, International Union of Painters and Allied Trades, District Council No. 6 (the "Union"), hereby submits this Post-Hearing Brief to address Respondent GMS's objections to the testimony of the Union's counsel, Kera Paoff, during hearing.[1]

I. INTRODUCTION

This matter concerns whether Respondents, Glass Fabricators, Inc. ("GFI") and Glass and Metal Solutions, Inc. ("GMS") (collectively "Respondents"), violated the National Labor Relations Act ("NLRA" or "Act") when 1) Respondents failed and refused to provide the Union with requested information necessary to carry out its statutory duties; 2) GFI unreasonably delayed in providing the Union with other necessary information; 3) Respondents refused to recognize and bargain with the Union; and 4) Respondents operated as alter egos, repudiating the contract between the Union and GFI and failing to abide by the Agreement as to the operations

[1] The Union submits this post-hearing brief on the limited issue regarding Paoff's testimony and the objection thereto. The Union believes the evidence presented at the hearing demonstrates Respondents violated the National Labor Relations Act as outlined in the Complaint; however, the Union does not intend to present any closing arguments herein, but rather defers to the General Counsel, and its anticipated post-hearing brief, for said arguments.

of GMS. As is customary, the information requests to Respondents were sent on behalf of the Union by its counsel, Widman & Franklin, LLC, specifically, Kera Paoff ("Paoff"). Accordingly, Paoff's testimony at the hearing was intended to 1) authenticate the information requests; 2) establish how they were served on Respondent; 3) authenticate the partial response received by GFI; and 4) authenticate other communications relative to the information requests. While not specifically referencing Ohio Rule of Professional Conduct 3.7, Respondent GMS's counsel objected to Paoff's testimony, claiming the Rules of Professional Conduct prohibit said testimony. The Honorable Thomas M. Randazzo overruled the objection, but allowed the Parties the opportunity to submit briefs addressing the issue.

Based on the circumstances in this case, Rule 3.7 does not prohibit Paoff's testimony. The purpose of the Rule prohibiting attorneys from acting as both and advocate and a witness in a case is to prevent the trier of fact from being confused or misled. Here, no such risk exists. Paoff played a limited role in the hearing itself, and the trier of fact is an experienced judge, rather than a lay jury. Further, to the extent the Rule would otherwise serve to prohibit Paoff's testimony, the exceptions to the Rule apply in this case.

Accordingly, Respondent GMS's objection should be overruled and Paoff's testimony admitted for purposes of evaluating the issues in this case.

II. BACKGROUND

In early 2016, the Union obtained information leading it to believe that Respondents were operating as an alter ego company, and therefore, on February 9, 2016, the Union's counsel made a written request to Respondents to furnish the Union with information about each company. (Attachment A to the Complaint). Initially, Respondents did not answer the request and the first charge was filed. During the pendency of that charge, Respondent GFI provided a

limited response. Thereafter, on July 29, 2016, the Union's counsel made another written request, specifically addressed to Respondent GMS, in care of its counsel who entered an appearance before the Board. (Attachment B to the Complaint). Respondent GMS's counsel acknowledged receipt, but never provided any response.

Following the Region's investigation, a Complaint was issued on April 27, 2017. The hearing in this matter commenced on August 14, 2017. Thereafter, the hearing continued and concluded on October 16-17, 2017. During the second and third day of hearing, Paoff testified regarding the information requests and the responses thereto. However, counsel for Respondent GMS objected on the basis that, Paoff could not testify for any reason on the Union's behalf in her role as retained counsel. Plaintiff maintains that the objection is wholly without merit for the reasons set forth below.

III. ARGUMENT

A. Ohio Rule of Professional Conduct 3.7(a)[2] and Pertinent Comments

Ohio Rule of Professional Conduct 3.7(a) states:

> A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless one or more of the following applies:
>
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case;
> (3) the disqualification of the lawyer would work substantial hardship on the client.

The Comments to the Rule provide insight as to the intention and purpose of the provisions. Those relevant to the case at hand are Comments [2] through [4]:

[2] Ohio Rule of Professional Conduct 3.7(a), and commentary, tracks the ABA Model Rule 3.7(a) almost exactly and, as a result, is virtually identical. Therefore, regardless of which Rule Respondent intends to rely upon, the analysis and result is the same – Paoff's testimony is not objectionable.

> [2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.
>
> [3] To protect the tribunal, division (a) prohibits a lawyer from simultaneously serving as counsel and necessary witness except in those circumstances specified in divisions (a)(1) to (3). Division (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Division (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.
>
> [4] Apart from these exceptions, division (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client.

B. **Rule 3.7 Does Not Apply In This Situation**

Rule 3.7 operates in order to prevent prejudice, a conflict of interest, and confusion. Here, none of those are threatened. Paoff's testimony did not conflict with the Union's testimony and was not against the interests of the Union. Accordingly, there is no conflict, or any potential conflict, of interest. *See* Comment [6] to Rule 3.7. Although Paoff represented the Union during the hearing, her participation was limited. She offered no opening statements or witnesses, nor

did she cross examine any witness. While Paoff participated in the hearing to ensure the Union's interests were protected, she offered no commentary on the evidence as contemplated by Rule 3.7, Comment [2]. Finally, the trier of fact is an experienced Judge versus a lay jury. There is no threat of any confusion to or misleading the trier of fact.

At least one court has suggested that Rule 3.7 does not apply in situations where a case is tried to a judge rather than a jury. In *Michael P. Harvey Co., L.P.A. v. Ravida*, 2012-Ohio-2776, 972 N.E.2d 1087, 1088, the Court stated:

> The official comment to Prof.Cond.R. 3.7 states that the purpose of forbidding a lawyer from acting as both an advocate and a witness is to prevent the trier of fact from being confused or misled by the lawyer's dual capacity. The concerns expressed in the comments to Prof.Cond.R. 3.7(a)(2) have **no applicability to this case because it was tried to the court**. The court fully understood that Harvey was acting pro se, so it should have been able to distinguish between his role as advocate and his role as a witness without the same risk of confusion that might have been present had the case been tried to a jury.

(emphasis added). Thus, Rule 3.7 does not apply in this scenario and Respondent GMS's objection to Paoff's testimony should be overruled.

In the alternative, if it is found that Rule 3.7 does apply in this matter, the exceptions outlined in the Rule apply and Paoff's testimony should be allowed.

C. The Exception Outlined by Rule 3.7(a)(2) Should Overrule Respondents' Objection

Rule 3.7(a)(2) states an exception for attorney testimony that relates to the *nature* or value of legal services rendered. This would apply to Paoff's testimony as it concerns the drafting and service of information requests sent on behalf of her client, the Union.[3] In other words, Paoff's testimony relates to the "nature of legal services" performed. Accordingly, Respondent GMS's

[3] Paoff's testimony was also offered for the purpose of authenticating communications received from Respondents' counsel in relation to the information requests. In his objection, Respondent GMS's counsel acknowledged that Paoff can present testimony to authenticate documents.

objection on the basis of Rule 3.7 is wholly without merit and should be overruled. *See Krysa v. Sieber*, 113 Ohio App. 3d 572, 579, 681 N.E.2d 949, 953 (1996)(attorney testimony regarding his miscalculations of value of marital property admitted under precursor to Rule 3.7(a)(2)); *In re Duke Investments, Ltd.,* 454 B.R. 414, 424 (Bankr. S.D. Tex. 2011) (where attorney prepared a proof of claim on a creditor's behalf during a challenge to a default judgment, the court allowed his testimony and held "Even if an attorney is likely to be a necessary witness, disqualification is not required if 'the testimony relates to the nature and value of legal services rendered in the case,'" citing ABA Model Rule 3.7(a)(2)). *See also Ross v. Olsavsky,* 2010-Ohio-1310, ¶ 50 (allowing attorney to act as both attorney of record and a witness where his testimony was of a limited nature, namely "his potential testimony would only have been relevant with regard to the issue of service of process, i.e. that Olsavsky received the complaint. His affidavit clearly indicates that he claims Olsavsky called him in June 2007 after receiving the complaint and left him her cellular telephone number.").

This case is exactly the kind contemplated by the drafters of Ohio Rule of Professional Conduct 37(a)(2). Accordingly, Respondents' objection should be overruled in its entirety.

D. **The Exception Outlined by Rule 3.7(a)(1) Likewise Applies**

In addition to the above described testimony fitting within the exception outlined in Rule 3.7(a)(2), the exception in subpart (1) equally applies. Rule 3.7(a)(1) holds that a lawyer can be both an advocate and a witness where the "testimony relates to an uncontested issue". Respondent GMS did not claim or argue that Paoff neither drafted nor sent the information requests; and, there was no testimony or other evidence presented that disputed those facts.[4]

[4] The only alleged dispute relates to whether Respondent GMS received the information request. This dispute, however, only came by way of its counsel's argument rather than any testimony to that effect.

As to other aspects of Paoff's testimony, that too is covered by the exception in Rule 3.7(a)(1). Paoff testified to the fact that there was no response received from Respondent GMS and only a partial (and delayed) response received from Respondent GFI. There is no dispute as to these facts. Additionally, Paoff's testimony, in part, related to the purpose and nature of the requests, *i.e.*, that the Union requested the information in order to evaluate the alter ego status of the companies and carry out its statutory duties as the exclusive bargaining representative for Respondents' employees.[5] This too is undisputed. First, the requests themselves identify the relevance and purpose of the information being sought. Second, Respondents have never argued that the information the Union requested was either irrelevant or not related to the Union's statutory duties.

Accordingly, Paoff's testimony should not be excluded. *See State v. Hunt*, No. 95APA03-370, 1995 WL 600509, at *3 (Ohio Ct. App. Oct. 12, 1995) (Defense counsel objected to testimony by prosecutor as to his attempts to contact an unavailable witness on the basis that the prosecutor's testimony was the only evidence establishing unavailability, but was overruled based on the predecessor to Rule 3.7(a)(1) because the prosecutor's *attempts to contact the witness* themselves were not disputed). *See also Bank One Lima, N.A. v. Altenburger*, 84 Ohio App. 3d 250, 258, 616 N.E.2d 954, 959 (1992) (attorney affidavit stating only how documents were received, rather than commenting on their content, did not provide substantive testimony, and therefore was admissible under the predecessor to Rule 3.7(a)(1)).

E. The Final Exception in Rule 3.7(a)(3) Serves to Overrule Respondents' Objection.

While Respondent has not argued for disqualification, but solely objected to the testimony offered by Paoff, the exception embodied in subpart (3) of the Rule is applicable. Comment [4] to the Rule discusses the purpose of the exception, noting that due consideration must be given to

[5] The remainder of Paoff's testimony related to background information necessary to show that she was competent to testify on the matters relevant to this case.

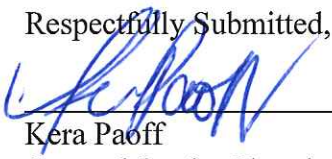
whether the testimony risks misleading the tribunal or causes prejudice to the opposing party. As discussed above, there is no risk to misleading the tribunal in this case. Second, Respondent GMS has not offered any argument, let alone evidence, that it is prejudiced in any way. On the other hand, the Union would suffer a substantial hardship if Paoff was prevented from testifying. While the managing partner, Marilyn Widman, oversees the work of Paoff, Paoff was the attorney assigned to this matter; drafted and sent the information requests; and participated in the investigation of the underlying charges in this case. To disqualify Paoff as either a witness or the representative of the Union in this case would result in either 1) the presentation of another witness who may be less qualified to authenticate and testify to the issues; or 2) the expense of another lawyer getting up to speed on this matter which has been pending for some time.

Therefore, Respondent GMS's objections must be overruled.

IV. CONCLUSION

Based on the foregoing, the Union respectfully requests that Respondent GMS's objections be overruled in their entirety and Paoff's narrow testimony be permitted as evidence in this hearing.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

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